No. 250.

Brf. of Lewis, Garland & Garland for Appts.

Filed Dec. 20, 1897.

IN THE

Supreme Court of the United States.

October Term, 1897.

THE CITY OF WALLA WALLA ET AL.,
Appellants,
vs.
THE WALLA WALLA WATER COMPANY.

No. 250.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF FOR APPELLANTS.

J. HAMILTON LEWIS,
A. H. GARLAND,
R. GARLAND,
For Appellants.

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THE CITY OF WALLA WALLA *et al.*, Appellants,

vs.

THE WALLA WALLA WATER COMPANY.

Appeal from the Circuit Court of the United States for the District of Washington.

Brief for Appellants.

The bill of the complainant (by appellees here), omitting unnecessary recitals, sets forth the following:

1st. The City of Walla Walla is an incorporated city.

2d. That the Water Company is an incorporated company.

3d. That the complainant entered into a contract with the defendant city to furnish water.

4th. The contract for twenty-five years, and exclusive.

5th. Defendant agreed to pay fifteen hundred dollars per annum rent.

6th. That complainant built improvements for the purposes of the contract to the amount of fifty thousand dollars.

7th. That the city, after eight years subsequent to the contract, decided to build new water-works.

8th. That such course was threatened and would deprive complainant of its annual rent and depreciate the value of its plant.

9th. Seeks injunction upon the ground that the threats to build water-works, if executed, would impair the obligation of complainant's contract, and be within the inhibition of the Constitution of the United States.—Rec. 1–17.

To this bill there was filed a demurrer.—Rec. 18.

This demurer was overruled by the lower court, exceptions being duly allowed.—Rec. 19.

First Assignment of Error.

The demurrer should have been sustained.

From the allegations of the bill there was no *jurisdiction* in the United States Circuit Court to take cognizance of the cause.

1st. There was no diversity of citizenship.

2d. *There was no question arising under the Constitution or laws of the United States.*

The following argument will comprehend both the second and third grounds of the demurrer:

It is admitted that both complainant and respondent are citizens of the State of Washington, and that all the parties to the litigation are citizens of the State of Washington, and were at all times in the complaint named

It is contended that the court assumes jurisdiction because of the allegation that the acts of the defendant will, if consummated, impair the obligation of the complainant's contract, and thus be in violation of section 10 of the Constitution of the United States forbidding any State to pass a law impairing the obligation of contracts.

We insist that upon the face of the bill it appears that the State of Washington is in no wise threatening or attempting to impair or affect in any wise the contract of the complainant, admitting that a municipal corporation will be regarded as the State wherever, in the exercise of its agency of the State, it assumes as such agent to do a thing which, were it attempted by the State, would be within the purview of the law forbidding such.

It is upon this premise or hypothesis that the complainant assumedly founds its complaint. We insist that from the allegations of the bill such assumption is apparently wrongfully founded and indulged without any authority of law.

We admit that where a city acts as an agent of the State and is proceeding to do a thing which would be clearly in violation of section 10 of the Federal Constitution, the Federal court would have jurisdiction irrespective of citizenship.

But, we likewise insist that there is a failure in the complaint, as likewise by the court below, to distinguish between acts of a municipality which are governmental or within the line of the agency of a State, and those acts which are clearly in the exercise of the municipality's business arrangements where its doings are but the execution of the will of the municipality.

We insist that a matter connected with the police power, looking to the regulation of its peace, of restraint of nuisances, protection of health, would be the exercise of its governmental department, and such acts would be

in the exercise of its agency of the State; but we urge that acts, such as making of contracts through its council for the furnishing of water to the city court-house, or of oil to the city jail, or of water to the municipal headquarter's building, or of water to all of the buildings of the people of the city, who may desire to use the same, is but the exercise of the city's business department, is related only and wholly to its citizens; the council in such case, as trustees for the citizens, should stand in the relation to them as stockholders to directors in private corporations, and in these matters the council of the city and the city itself is but the agent and trustee of the citizens of that city, and in no wise the agent of the State.

To this end we, therefore, urge that as the city is therefore in the discharge of such duties as is alleged against it, the agent of the city and its citizens, exercising a power as a trustee of the citizens, it, in such conduct, derives no power from the State, and in the exercise of such matters in no wise represents the State. For this reason it can not be regarded as an agent of the State, the State can not be regarded as its principal, therefore the State can not be charged as being the actor in the proceeding, whether it be the making of the contract or the impairing of an obligation of one. Consequently the State in no wise, upon the admitted facts, is the impairer by legislation or otherwise of the contract.

For this reason, the Constitution of the United States, within its meaning literally construed, as for the purposes of jurisdiction it must be, has no application, and the Federal court therefore clearly would have no jurisdiction.

Plainly, this case, upon the admitted facts of the bill, if well pleaded, a violation of a contract by a citizen of the State, affords remedies under the ordinary legal and equitable law within that State.

Thereupon the demurrer should be sustained for want of jurisdiction in the lower court.

Following we present references upon this subject of all classes:

To illustrate with more definiteness than we assume in this brief, the distinction in the relation of the municipality to the State, we quote the words of the Supreme Court of Ohio upon analogous questions in *Western College* vs. *City of Cleveland, 12 Ohio St., 377.*

> "Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals, of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations, to preserve the peace and protect persons and property when they are to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the property comprised within the limits of the corporation, and its adaptation for the purposes of residence and business. As to the first, the municipal corporation represents the State; as to the second, the municipal corporation represents the pecuniary and proprietary interest of the individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

Upon this distinction, more fully reported, the Circuit Court of Appeals for the Fifth Circuit, denied that the city of New Orleans was the agent of Louisiana in her violations of the contract of security to the home of certain Italians within her midst.

New Orleans vs. *Abnagatto, 10 C. C. A., p. 361.*

The Supreme Court of New York in *Maxmilian* vs. *Mayer*, 62 N. Y., 160, by Folger, J., says:

> "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. * * * In the exercise of the former power, and under the duty to the public, which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for failure to use its power well, or for any injury caused by using it badly; but where the power * * * is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents."

This distinction, so well founded and recognized now, was urged, and with some enlargement, particularly applicable to this case, was adopted by the Circuit Court of Appeals (Fourth Circuit), in *Safety Insulated Co.* vs. *Mayor of Baltimore, 13 C. C. A. Rep., p. 377, et seq.*

In this case the City of Baltimore had contracted with an electric light company to provide lights for the city upon certain terms of rent, etc. The action is one at law, recognizing that one in equity was not tenable. In discussing the distinction here made which was therein referred to, the court said:

> "The court was in error in not discriminating between the acts of the municipal corporation when acting in its governmental capacity and when act-

ing as a property holder, and putting contracts made in these different capacities upon the same level of liability for nonperformance. * * * The position taken by the defendant is that the city council, in passing this ordinance, advertising for bids, accepting this bid, and engaging in this work, acted in its governmental capacity, and that no contract so made is irrevocable. It seems to be a contradiction in terms to speak of a contract revocable at the will of one of the contracting parties. Be this as it may, municipal corporations, confining the term to cities and towns, possess a double character, the one governmental, legislative or public; the other in a sense proprietary or private. In its governmental or public character, the corporation is made by the State one of its instruments, the local depositary of certain limited and prescribed political powers to be exercised for the public good on behalf of the State and not for itself. These legislative or governmental powers they can not cede away or control or embarrass by any contract disabling them from performing their public duties. Western Saving Fund Soc. *v.* City of Philadelphia, 31 Pa. St., 182. Such contracts necessarily are void *ab initio*. They are not within the scope of the powers of the corporation. But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the State at large, but for the private advantage of the particular corporation as a distinct legal personality. As to such powers, and as to the property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* a private corporation.

This whole question was discussed in its application to the subject-matter precisely as at bar, by the Circuit Court of Appeals for the Eighth Circuit, in Illinois Trust Company *vs.* Arkansas City, 22 C. C. A., Rep. 181.

In which the court, adverting to the failure of the lower court to recognize the distinction, has to say:

> "First, it ignores the settled distinction between the governmental or public, and the proprietary or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation."

We incline to the view that this is the first time this distinction is sought with a view of denouncing jurisdiction in the Federal court, where jurisdiction is sought upon the ground of the city's agency of a State within section 10 of the Constitution.

Our search, however, clearly demonstrates that the distinction here as to the respective sources from which each power is drawn, to wit, the duty of its governmental capacity as being drawn from the State, and its duties in its business capacity being drawn solely from the people of the municipality, and in no wise related in the form

of agency or other governmental relations to the State, is amply borne out by the following cases:

Com. vs. *Philadelphia, 132 Pa. St., 288.*
New Orleans Gas Light Co. vs. *New Orleans, 42 La. Ann., 188.*
Wagner vs. *Rock Island, 146, Ill., 139.*
Vincennes vs. *Gas Light Company, 132 Ind., 114.*
Indianapolis vs. *Indianapolis Gas Light Co., 136 Ind., 396.*
Reed vs. *Atlantic City, 49 N. J. Law, 558.*

The full subject has received consideration, as a matter of course, in the copious work of Judge Dillon on Municipal Corporations (3d Ed., Sec. 66); and, subsequently in the 4th Edition, adopting with extension the views urged by the supreme court of New York.

(Secs. 966, 968, 974.)

Then the question is at once presented: Is the contracting for water not purely the exercising of the business functions of the city, and wholly separate from any relation of sovereignty or agency of a State? Is not the contract, as urged in the complaint, but one for the benefit of the citizens through their agent, the city for a single and sole purpose of the personal benefit of the citizens? Is it not one that does not relate to the government of the inhabitants, but to obtain merely a private benefit for the city and its denizens? We respectfully insist that such has been decided and established to be the law.

> "In contracting for water-works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its citi-

zens." Opinion by Sanborn, J., in *Trust Company* vs. *Arkansas City, 22 C. C. A. Rep., 182.*

City of Cincinnati vs. *Cameron, 33 Ohio St., 336.*
Safety Wire and Cable Co. vs. *Baltimore 13 C. C. A. Rep., 375.*

From all this, it must appear that the alleged acts against the city are not of a nature to constitute it as the representative of the State, by which the remedy of the complainant, if any, can be regarded as being within the constitutional clause inveighing against the State impairing the obligation of contracts.

For this reason, the Constitution is not brought into question—merely the ordinary principles of equity between citizens of the same State, out of which clearly there can not attach any jurisdiction to the United States courts, but wholly to the local tribunals at the residence of the litigants.

Jurisdiction.

II.

Admitting, for the demurrer's sake, that the acts complained of are properly pleaded and are sufficient to come within the constitutional provisions, still the court is clearly without jurisdiction of the subject-matter, because the complaint is wholly devoid of facts showing any matters or acts which would as facts or acts vest the jurisdiction. A terse analysis of the bill discloses this. Its statements are:

1. A contract and ordinance recited.

2. A determination of the city to build a water-works, and ordinance recited.

3. That the property of the complainant will be annihilated. (In what way or by what result or what would

produce the annihilation, whether the result of competition or the falling of the price or the failure of the city to pay rent or what is not stated.)

4. That the city's competition would deprive it, the complainant, of its fifteen hundred dollars a year presumably. (No certain allegation that the city has so threatened, no allegation that the city has ever said it would refuse to pay the rent, or would decline to pay the rent, or that any demand had been made upon the city to continue to pay the rent, and that such had been refused, nor any facts showing why the conclusion is drawn.)

5. That its plant, worth fifty thousand dollars, would be depreciated in worth and value by the action of the city. (How is not asserted, whether depreciated in value in the estimate of the city or in the estimate of the complainant or because the citizens of the city would take water from the city rather than from the complainant is not shown, nor is any fact alleged, save the simple fact that the value and worth or profit or proceeds from the contract would be less.) Such conclusions show no infringement of a constitutional right.

Because the courts do not care, nor is it the province of the law to protect a contract from having its profits diminished or the advantages anticipated by the contractor at the time of making it, fulfilled according to the estimate. The language "impairing the obligation" means to destroy or affect the legal status or the legal and mutual obligation of the contract not its business investment, not its prospective proceeds, not its contemplated value as an enterprise.

As said by the court in *Curtis* vs. *Whitney, 13 Wall., 68*—

> "Nor does every statute which affects the value of a contract impair its obligation. It is one of the

> contingencies to which parties look in making * * * contracts that they may be affected in many ways by State and national legislation."

And as said in *Hamilton Gas Light Company* vs. *Hamilton, 146 U. S., 278*—

> "It may be that the stockholders of the plaintiff supposed at the time * * * when they made their original investment that the city would never do what evidently is contemplated by the ordinance of 1889; and it may be that the erection and maintenance of gas-works by the city at the public expense and in competition with the plaintiff will clearly impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established; *but such considerations can not control the determination of the legal rights of the parties.*"

Therefore, from the complaint, it is apparent that if the conclusions are admitted, there is nothing which can be drawn from the Constitution which would vest jurisdiction; and as the statements are but conclusions, and altogether in order to reach a mental conclusion either of jurisdiction in the lower court or a probable one in the higher court, one must engage in the employment of presumptions that what should have proceeded in detail and that which appears to have been a consummation, if it did so proceed; and further presume that whatever wrong complainant alleges would eventually work, if uninterrupted, such an inroad upon its contract as to impair its value; and, therefore, if it shall ever become valueless, its obligation is useless, and therefore the impairing of the value is the impairing of the obligation.

But it has too often been asserted by this court that whenever, from the complaint, presumptions must be indulged, either of fact or as a condition of law, not stated

as facts when plead in detail as a matter of law, that the very necessity for the indulgence in such presumption of itself defeats jurisdiction.

In *Hanford* vs. *Davies, 16 Sup. Ct. Reporter, p. 1053*, the court says:

> "It is well settled, that as the jurisdiction of a circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction, unless the contrary affirmatively appears, and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown* v. *Keene, 8 Pet., 112; Grace* v. *Insurance Co., 109, U. S., 278, 283* (*3 Sup. Ct., 207*) and authorities cited. These principles have been applied in cases where the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same State is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States. We are not required to say, that it is essential to the maintenance of the jurisdiction of the circuit court of such a suit that the pleadings should refer, in words, to the particular clause of the Constitution relied on to sustain the claim or immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance. *Ansbro* vs. *U. S., 159 U. S., 695* (16 Sup. Ct. 187").

This doctrine against a pleading averring and containing but conclusions of law, is held sufficient grounds for sustaining a demurrer in *Fogg* vs. *Blair, 139 U. S., 118.*

But there is another presumption essential, to be indulged in order to assume an act legally done by a city, in order to be an illegal act within the constitional inhibition against a State's impairing the obligation of contracts. It is: Complainant in its bill alleges that the city by ordinance subsequent to its contract, to wit, on the 20th day of June, 1893, legislated to provide for itself water, and therein set out the ordinance.—Rec., 10–11.

Pleading that the ordinance was ratified by a vote of the city, and that by this latter ordinance its contract was impaired; but at no place and at no time is it stated to the court that the latter ordinance was either within any direct act or permissible provisions of the charter of the city or any act of the legislature. It is true, that in a State court, a presumption will be indulged that a power necessary for an inferior organization within that State to do a thing has preceded the doing of it until the contrary is shown; but in a Federal court, which is not a domestic court in such matters as the case at bar, and where every fact necessary to maintain jurisdiction must affirmatively be pleaded no such presumption will be indulged; but, to the contrary, the absence of the allegation will be presumed as an admission of the non-existence of the facts which should been alleged; which means, therefore, that the act or the ordinance which the complainant insists would, if executed, be an impairment of its contract, is simply one without authority of legislative grant, therefore *ultra vires*, which, rendering the ordinance itself illegal for want of authority from the State, leaves no ordinance, and the previous ordinance or the contract with the complainant, unaffected and unimpaired. The mere fact that an invalid ordinance or one without authority has been passed which might cloud some rights of the complainant as a debtor

seeking credit, is a mere matter of a private injury to it where such exists and is readily remedial in an ordinary action to have the cloud set aside or the ordinance declared illegal as the improper act of a private corporation called the city of Walla Walla, as it would have proceeded against any other private act of any other private corporation that might have illegally clouded its title. Such, however, would give no right to go into the Federal court under a claim of a constitutional right, because there are no facts showing that such illegal condition exists within the city from the preceding facts as should require the application of a constitutional principle to avoid.

This view here asserted is well sustained in the words of this court:

> "The plaintiff's first contention is that there is no statute of Ohio authorizing the city, etc. * * * The jurisdiction of that court (meaning the Circuit Court of the United States) can be sustained only upon the theory that the suit is one arising under the Constitution of the United States; but the suit would not be of that character if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the city has not in any form given or attempted to give the force of law. *A municipal ordinance* not passed under supposed legislative authority can not be regarded as a law of the State within the meaning of the Constitutional prohibition against State laws impairing the obligation of contracts."
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> *Murray* vs. *Charleston, 96 U. S., 432.*
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> *Lehigh* vs. *Easton, 121 U. S., 388.*
>
> *New Orleans Water Co.* vs. *Louisiana Sugar Refining Co., 125 U. S., 18.*
>
> "Suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

"None of the presumptions essential to maintain the conclusion, either that the legislative power existed or that any other facts existed, will be indulged in order to maintain jurisdiction, and where the fact is not stated the absence of such statement would defeat jurisdiction or create the presumption of the want of jurisdiction."

II.

Demurrer—Want of Equity.

From the allegations of the bill, taking the facts to be well pleaded, there is nothing upon which a court should grant relief, either in the form of injunction or any other equitable remedy.

We will here discuss one or two of the general phases necessary to the demurrer, and will leave the remaining and more important one, to wit, the question of the power of the city to make as a valid contract the contract alleged in the bill, as the closing observation in the discussion of the demurrer.

Estoppel.

1st. We insist that the complainant, by the bill, is estopped to claim that it has an exclusive right and that the city has not the right to erect water-works and supply itself with water during the term provided for the existence of complainant's contract. First, it appears from the bill that by the act incorporating the city of Walla Walla, being act of the Territory of Washington, 1883, the city of Walla Walla was endowed with the power to *erect and maintain* water-works, etc., within or without the city limits, and all regulations necessary to carry the power into effect is permitted by the act with the conditional proviso, upon which the act is dependent, that the works shall not be erected by the city until

a majority of the voters, who shall be freeholders, shall, at a general or special election, vote for the same. Rec., 1–2.

That on the 15th day of March, 1887, the city entered into the alleged contract with the complainant, in face of complainant's knowledge that an election was required and an assent at such election of a majority of the freeholders, to such contract. Such election was never had—the consent of the freeholders never given. The complainant assumes to contract for twenty-five years, upon the terms heretofore stated, permitting upon certain conditions a court to declare it forfeited, and providing in section 8 of the contract as follows:

> "Neither the existence of said (this) contract nor the passage of this ordinance shall be construed to be, or be a waiver of, or relinquishment of any right of the city to take, condemn, and pay for the water rights and works of said or any company at any time," etc.

Here is the admission of the right and privilege of the city, during the contract, to build its water-works. Here is a statement showing the knowledge of the complainant of the city's contemplation of building its water-works, and the privilege of the city to condemn any water-works or plant for this public purpose and providing only the manner in which this complainant's property shall be treated in this process of condemnation. This recognition of the right of the city to build its water-works and take complainant's property or any other, by condemnation, prohibits the complainant from contending that the city had not such power at any time. The provision merely and only reserves to the complainant the right to insist that *when the city does build it shall take complainant's property.*

This merely leaves the question as follows: That should the city build and omit to take the complainant's property by condemnation or private sale, the complainant, by virtue of this provision would have the right to recoup any loss it may suffer by reason of such failure, against the city, and that by an ordinary action at law for the value of its plant upon the assumption that the contract was a conditional sale of the same, delivery to be performed at the time the city assumed to build its water-works. Certainly this contract gives no right to the complainant to claim that the city, in undertaking to build its water-works, is acting without the object of the contract, or contemplation of the contract; for certainly the law will infer that the complainant has assumed that the city would do that which it admits is the city's privilege to do and that at such time as the city shall so elect under the law; and the complainant will not be heard to say that that which the law will insist it should naturally have assumed, it did not so assume; and for such failure of the exercise of common prudence its plain, due regard for the city's rights under the law, the complainant should not be requited by extraordinary relief in equity. Therefore this complainant in accepting this contract, with an act of the legislature empowering the city to erect its own water-works at its pleasure by vote, and it so proceeding to do, and the contract of this complainant recognizing this right and making reference to condemnation concerning it, the complainant must be held to have taken this contract, as this court has said, "And to have assented to such reservation and such condition and this assent to such conditions and such concurrence being evidenced by the complainant's accepting the contract with the knowledge and recognition in the contract of the right and privilege of the city."

Greenwood vs. *Union Freight Road Co., 105 U. S., 13.*
State vs. *Hamilton, 47 Ohio St., 52.*

Wherein the court says: Section 2486 (as does the act of 1883 under discussion) gives the power to the council either to erect gas-works or purchase works already erected. The authority granted is not coupled with any conditions, but it is to be exercised as the council may deem to be for the public good. * * * The interests of the city may demand that a gas company established and doing business, although complying with all the statutes and ordinances, should not continue in the exclusive possession of the field of operations. And referring to the fact that if the complainant should continue, that the city should not go into the business until and only when it had condemned the complainant's property and paid for it, the Supreme Court of the United States, in affirming the Supreme Court of Ohio, *supra*, say:

> "If parties wish to guard against contingencies of such kinds, they must do so by such clear and explicit language as will take their contracts out of the established rules that public grants susceptible of two constructions must receive the one most favorable to the public."

To the same effect, Stein *vs.* Bienville Water Company, 144 U. S., 67, said this court:

> "A corporation by accepting the grant subject to the legislative power, must be held to have assented to such reservation."

The court further say:

> "It is this Arkansas law upon which the corporate existence of the company depends. It may be repealed, so that it will cease to be a law. * * * All this may be done at the pleasure of the legislature. * * * The general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exercised at the pleasure of the legislature."

"The power reserved to alter, amend or repeal (as would be by the building by the city of its own works, as this works the repeal of a prior ordinance to the contrary, confessedly) a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Close v. *Cemetery, 107 U. S., 466.*
Water-works v. *Schottler, 110 U. S., 347.*
Penn. College Cases, 13 Wall., 190.
Tomlinson v. *Jessup, 15 Wall., 454.*

It will be observed that this is exactly what the legislature of the State of Washington did in enacting the law allowing the city to build its own works under which the ordinance complained of was passed. (See ordinance and new charter, hereinafter referred to.)

It is clear that the law in existence, together with the recognition of the same by the contract (we refer to the law of 1883) giving the city the right to build its water-works, and in no wise naming the time or conditions when the same should be done, other than having the ratification of the act by election, prohibits the complainant from claiming that such was not within the power of the city.

The reservation in paragraph 7 of the contract is as follows: "Until such contract shall have been avoided (referring to declaration of forfeiture by a court) the city of Walla Walla shall not erect, maintain or become interested in any water-works except the ones herein referred to, save as hereinafter specified."

This clause can not be urged for aught in this case. The words, "save as hereinafter specified" refer essen-

tially to section 8 of the contract, and was merely meant, clearly, to provide against the city of Walla Walla entering into a contract with a rival private water company. No reservation can be assumed to have included the intention of the city to construct its own water-works, as that is recognized as a privilege in section 8.

Clearly, therefore, this reservation in the latter part of section 7, upon which the learned court partly based some of its reasons to justify a conclusion upon another branch of the case can have no application to this question of estoppel, or in anywise correct or aid the complaint as against this apparent confession of estoppel upon the facts stated.

We respectfully insist that the act of the legislature of 1883, empowering the city to build its works, and section 8 of the contract of complainant with the city, prohibits and estops the complainant from complaining against the erection by the city of any water-works, and limits it, by the closing sentences of section seven, to an objection merely against a rival private company.

It will be noticed that sections 7 and 8, herein referred to as part of the contract of complainant, are meant to refer to the ordinance passed March 1st, 1887, setting out what the contracts shall be, and is the same as the words of the contract, as appears on page 8 of the transcript, section 13.

We refer now to the last remaining question upon this branch, as to what is the meaning of the words, "The city of Walla Walla will not erect, etc., save as hereinafter specified." The word "erect" in that clause, in view of what has theretofore preceded, can only mean will not erect in any other manner than by condemnation of the complainant's property. This certainly, in view of the provisions hereinbefore referred to, to wit, that contained in section 8 of the ordinance, together

with the provisions of section 7, ordinance of date of 15th of March, 1887, which, as we have heretofore insisted, is but a contract by the city with the complainant, not to erect, but to take the erected works of the complainant by condemnation in the exercise of its public power as a city to build its water-works.

This limits the whole proposition to the single question, that the city's violation, admitted upon the allegations of the bill, is but that of erecting in a manner contrary to the contract—not that the contract prohibits all erection—merely an erection not in a manner as provided the erection should take place; that is to say, of the incorporating and including complainant's property.

What is the remedy? By this complainant's own bill, by the contract and by the act of the legislature, clearly it is the value of the complainant's property which would have been taken for its market value in the process of the city's public erection. Further than this the complainant is estopped to contend.

Complete Remedy at Law.

But the demurrer, for want of equity, must be sustained because of an apparent full and adequate remedy at law. The complaint shows the whole plant value of $50,000; existence of contract, twenty-five years; rental per year, $1,500—$37,500; or full total, $87,000.

The complaint showing city to be solvent, and for aught that appears having the full sum liable to immediate execution in the treasury—certainly in assessable property. This, upon assumption, that the whole contract becomes due upon the first breach, but gives action for the amount certain in damages readily realized in one determinate action—

Smith v. *New Orleans Co., 141 U. S., 12 Sup. Ct. Rep., 113.*

It will be observed that no denial or refusal of the *annual rent* of $1,500 has ever been made or that any act of the city has ever impaired the value of the contract, except as alleged the *passing of an ordinance—no allegation of the doing anything under said ordinance.* This gives no right in equity. Courts can not set aside the ordinances of a city, or prevent their existence or passage upon the ground they might prevent the recording of a certain deed—*i. e.*, the clouding of some citizen's title to something he claimed under some *previous ordinance.* It is not the policy of equity to hastily enjoin the action of a city ordered by a majority of its people in favor of some one citizen, thus staying the whole municipal machinery, but will in all but most flagrant cases (where no other remedy or course is permissible) remit the citizen litigant to the law courts. Thus, on the assumption that the greater equity should go to the citizens who are so seriously affected, if one citizen should be allowed to urge successfully such process every time he fancied himself injured in some manner.

It being inherent right and privilege of a city to pass ordinances as its law-making body may conclude advisable.

East Hartford v. *Bridge Co., 10 How., 511, 533–4;*
Williamson v. *New Jersey, 130 U. S., 189–199.*

And as decisive on this view we point to the suggestions and reasonings in

Board v. *Skinkle, 140 U. S., 334.*

This court went into this question of the *inherent* right of municipalities to legislate on questions of *health, public morals,* and public safety, and in conclusion urged that it was beyond the city to contract these *privileges* of a people away to any person or company, by which such

legislation could be enjoined on behalf of an individual merely on allegation *of private depreciation* of his *commercial benefits* saying. It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts or the deprivation of property without due process of law, * * * etc., * * * are not violated by the legitimate exercise of legislative power in securing *the public safety, health, and morals.* The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.

New York v. *N. E. Ry. Co., 152 U. S., 14 Supt. Ct. Rep., p. 440.*

It is sustained as a doctrine now established in—

Beer v. *Massachusetts, 97 U. S., 25;*
Barbier v. *Connolly, 113 U. S., 27;*
Gas Co. v. *Louisiana, 115 U. S., 650;*
Budd v. *New York, 143, U. S., 517.*

That the question of the hardship of operation or embarassing manner of the execution of the new law can not enter into the consideration of its constitutionality is settled. See

New York v. *N. E. Ry. Co., 14 Sup. Ct. Rep., 440–441.*

The objections which the defendant makes to the contract involved in this case may be considered under the following heads:

(1) The contract creates a monopoly, which, in the absence of an express grant from the legislature of

power so to do or such power necessarily implied, is void as in contravention of public policy;

(2) The contract is void as an attempt to contract away a part of the governmental power of the city council;

(3) The contract is void as creating an indebtedness in excess of the charter limit;

(4) The contract is in violation of the express provisions of a general statute of the Territory of Washington.

I.

The contract is void as creating a monopoly.

The powers of the city upon the subject under consideration are found in sections 10 and 11 of the city charter. By sections 10 the city is authorized "*to grant the right to use the streets* of said city for the purpose of laying pipes intended to furnish the inhabitants of said city with light or water * * * for a term not exceeding twenty-five years." Section II provides: "The city of Walla Walla shall have power to erect and maintain water-works within or without the city limits, or to *authorize the erection* of the same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, etc."

It may be conceded that the State, by an act of the legislature, may directly confer upon a company a monopoly of the business of supplying water to a city, and that they can in like manner authorize a city to confer such exclusive right, and that contracts entered into under such power will be sustained. We do not need to consider at this point how far the State would be bound by such contract against subsequent legislation in the exercise of its police power.

But when the right to the exercise of a monopoly is thus asserted, it must not be allowed to rest upon an uncertain or doubtful interpretation.

"The principle is that no franchise which is granted by a State is ever construed to be exclusive whether it be in the nature of a contract or not, unless it be so declared in clear terms or be necessarily implied."

Railway Company vs. *Railway, 79 Alabama, 472; 2d Dill., Munic. Corp., 3d Ed., Secs. 715, 716.*

"In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."

Railroad Co., vs. *Commissioners, 21 Penn., State, 22.*

These cases, it is true, are constructions of the charters of private corporations; but the rule applies with at least equal force to the complainant's rights, since the complainant must rest its rights upon the charter powers conferred upon the defendant. "It is a general and undisputed proposition of law that *a municipal corporation* possesses and can exercise the following powers, *and no others:* First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not merely convenient, but indispensable."

1 Dill. Munic. Corp. (3d Ed.), Sec. 89.

This definition of the powers of corporations has been cited and approved so often as to have an authority almost equal to a legislative declaration. There is no clause of this definition within which the power to make such a contract as the one under consideration can by any possibility be brought, unless it be the second, that it is "necessarily or fairly implied." A mere reading of the sections is enough to show that the power is not within this clause any more than the others.

But we are not without authority upon this point. The cause which have so held are numerous, and by courts of the very highest character.

Brenham vs. *Water Company, 4 S. W., 143,* is parallel with our case in every particular, except that it does not appear that the city had express charter power to erect water-works, which makes the case even stronger. In that case, the city charter provided that the city "should be capable of contracting and being contracted with;" should have power "to provide the city with water, to make, regulate, and establish wells, pumps, cisterns, hydrants and reservoirs in a street or elsewhere within said city, or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants," and under these powers they contracted with the company "for supplying said city and the inhabitants thereof with fresh water for domestic, manufacturing, fire, and other purposes," and they also reserve the right, after the expiration of ten years, to "purchase the water-works at such price as might be agreed upon by arbitrators." The city did not, however, attempt to preclude itself from obtaining water from any other source than the contracting company. The court say, in passing upon this contract and the charter powers under which it was made: "The city having been given such power, it must be understood that it was intended not only that it might so do, but that it should use it, if deemed necessary for the public welfare, long as the power is possessed by it; that is, until taken away by the legislaure."

> "Such corporations may make or authorize contracts, but they have no power to make contracts or pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties."

Other cases clearly asserting the same doctrine are:

Garrison vs. *City of Chicago, 7 Biss., 480;*
Davenport vs. *Kleinschmidt, 13 Pac., 249;*
Logan vs. *Paine, 43 Iowa, 524;*
State ex rel. vs. *Cincinnati Gaslight Co., 18 Ohio St., 262;*
Minturn vs. *La Rue, 23 Howard, 435;*
Norwich Gaslight Co. vs. *Norwich, 25 Conn., 19;*
Gaslight Co. vs. *Middletown, 59 New York, 231;*
New Orleans City R. R. Co. vs. *Crescent City, 12 Fed. R., 308.*

II.

The contract is void as an attempt to barter away a part of the governmental power of the city council.

We think it can not be successfully questioned that the furnishing of a city with water for domestic use, extinguishment of fires, for flushing sewers, and otherwise promoting the health of the inhabitants belongs to a class known as police powers. It is well known that this class of powers covers a very wide field. The very extent of and importance of them have caused courts to be exceedingly cautious about attempting any definition of the power, lest they might thereby seem to exclude something which ought to be included. They are powers, moreover which grow and expand with the progress and requirements of an advancing civilization. It is only within a few years that the paramount importance to the public health of a pure-water supply has been recognized. The extraordinary increase of population in towns and cities in modern times, the progress of scientific discovery, the better knowledge of the conditions tending to promote or impair the health of a community have brought within the purview of the police power many subjects which but a short time ago would have been considered as having no relation to it. The best definition which

we have seen is found in 15 Am. & Eng. Enc. of Law, p. 1166, which is as follows:

> "The police power of the State has not so far received a full and complete definition. It may be considered, however, to be the right of a State, *of a State functionary*, to prescribe the regulations for the good order, peace, health, protection, comfort, convenience, and morals of a community which do not encroach on the like power vested in Congress by the Federal Constitution, or which do not violate any of the provisions of that organic law. Of this power it may be said that it is known when and where it begins, but not when and where it terminates. It is a power in the exercise of which a man's property may be taken from him, his liberty may be shackled, and his person exposed to destruction in cases of great public emergency."

See, also—

Dill. Munic. Corp., 3d Ed., Sec. 141, 146–976;

and for cases in which the power has been in some measure defined:

Grant vs. *City of Davenport, 36 Iowa, 402;*
Munn vs. *The People of Illinois, 97 U. S., 113;*
Lawton vs. *Steele, 152 U. S., 132;*
Stone vs. *State, 101 U. S., 814;*
State vs. *Wheeler, 44 N. J. L., 888;*
New York vs. *N. W. Ry. Co., 14 Sup. Ct. Reps., 441;*
Insulater Co. vs. *Baltimore, 13 C. C. A., 378–9.*

See full discussion of the principle and facts applicable to case at bar—

Trust Co. vs. *Arkansas City, 22 C. C. A., 179–80, etc.*

It would be a singular process of reasoning, indeed, which would bring within the police power of a State the subject of a franchise for a ferry, the power to license hacks, to regulate express wagons, to erect and control a market or a public wharf, and which would exclude from that

power a subject so closely related to the comfort, convenience, often the health and lives of a community, as well as the safety of its property, as is the supply of water.

In *Connery* vs. *New Orleans Water-works Co., 7 Southern, II,* it is expressly held that the water supply comes within the police powers of a municipal corporation.

The cases upon this subject are so numerous that the chief difficulty is in the selection. We cite, however, as fairly representing the current of authority.

Gale vs. *Kalamazoo, 23 Mich., 345.*

This case was decided by Judge Cooley, and there can not be found anywhere a more intelligent or vigorous discussion of the principles which underlie the present controversy than in his opinion, nor a case more lucid and compact than the one next cited.

National Water-works vs. *City of Kansas, 28 Fed. R., 921;*

Illinois Canal Co. vs. *St. Louis, 2 Dill., 77–85;*

Lord vs. *City of Oconto, 2 N. W., 785;*

New Orleans City Ry. Co. vs. *Crescent City Ry. Co., 12 Fed. R., 308;*

Jackson Co. Horse Ry. Co. vs. *Rapid Transit Co., 24 Fed. R., 307;*

Saginaw Gaslight Co. vs. *Saginaw, 28 Fed. R., 529–535;*

Richmond Co. Gaslight Co. vs. *Middleton, 59 N. Y., 238;*

Presbyterian Church vs. *New York, 5 Cow., 538;*

Millhow vs. *Sharp, 27 N. Y., 622;*

Oakland vs. *Carpenter, 13 Calif., 540;*

Indianapolis vs. *Gas Co., 66 Ind., 369.*

Butchers' Union Co. vs. *Crescent City, 111 U. S., 746; (41 C. R., 652);*

Ill. Trust Co. vs. *Arkansas City, 22 C. C. A., 179.*

It may be worth while to say that the cases exhibit the vigorous and unsparing manner in which that court has applied the salutary principle for which we are contending to new facts as they arose. The first reference to the police power which we have observed in the reports of this court is in *Gosler* vs. *Corporation of Georgetown, 6 Wheaton, 593*, and there Chief Justice Marshall speaks upon the subject in these cautious terms:

> "When a government enters into a contract there is no doubt of its power to bind itself to any extent not prohibited by its Constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body (referring to the town of Georgetown) to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the legislature enables it to enact may well be questioned. *We rather think that a corporation can not abridge its own legislative powers.*"

The expression here is almost timid; but the idea suggested, like many others of the great jurist, was instinct with vitality and power of growth. In *Chicago, etc., Ry. Co.* vs. *Fuller, 17 Wal., 550*, the same principle was invoked, and applied to a law requiring the posting of freight rates, and the law was sustained as a police requirement. In *Mann* vs. *Illinois, 94 U. S., 113*, the same power was found sufficient to sustain a law regulating elevator charges. In *North Western Fertilizing Co.* vs. *Hyde Park, 97 U. S., 659*, the same principle was sufficient to overthrow the alleged vested rights of a fertilizing company to continue their business after the growth of the city had rendered it obnoxious. In *Boston Beer Co.* vs. *Moss., 97 U. S., 25, and in Muggler* vs. *Kansas, 123 U. S., 623*, the same principle sustained prohibition laws

against the contention of manufacturers that such laws interfered with their vested rightr to manufacture beer. In *Patterson* vs. *Kentucky, 97 U. S., 501*, it sustained a law regulating the sale of illuminating oil, although the oil was a patented article.

The same fruitful principle was appealed to in the

Slaughter-house cases, III U. S., 746;

which have become one of the landmarks of our constitutional law. In Barbier *vs.* Connolly, 113 U. S., 27, the same comprehensive principle could regulate a Chinese laundry.

Certain cases which appear to hold contrary to the rule we assert, may be easily distinguished.

See Connery *v.* New Orleans Water-works, 7 Southern, II.

The facts in this case are too complicated to summarize conveniently, but the contract the Court was construing, so far as appears from the decision itself, was a contract for no definite time, but simply to pay a stipulated price for each hydrant used by the city. The contract was assailed upon various grounds of fraud, and as contrary to specific provisions of the charter; but the questions here involved do not seem to have been involved in that case; at all events, they were not considered, and the case was decided by a bare majority of the court.

Burlington Water-works Co. v. *Burlington, 23 Pac., 1068*, was for pay for water which had already been furnished. It was resisted; first, on the ground that the contract with the city had been obtained by bribing the city officers; second, because it was claimed the water was not of the quality prescribed. The proceedings by which the ordinance was passed under which the contract was made were regular on their face, and the contract, after

the ordinance was obtained, was assigned to an innocent purchaser. Upon these facts the court held that the innocent purchaser was not affected by the bribery, even if it existed, and that the city, having accepted the water for a year without complaint, was bound to pay for it; and these were the only points decided.

Des Moines Street Ry. Co. vs. *Des Moines, 33 N. W., 613,* is in point. There a city has granted an exclusive right to a street railway for a term of thirty years, and the court sustained the grant. We venture the assertion that the case is without precedent and without a successor. The one point upon which all the cases agree, those which recognize the right to confer an exclusive franchise, as well as those which deny it, is that a city can not grant an exclusive right to the use of its streets. The case has been criticised by Brown, J., in

Saginaw Gaslight Co. vs. *Saginaw, 28 Fed. R., 536;* and in

Grand Rapids, etc., Co. vs. *Grand Rapids, 33 Fed. R., 659;*

and also by the Supreme Court of Oregon in

Parkhurst *vs.* City of Salem, 32 Pac., 304.

Memphis vs. *Deane, 8 Wal., 64,*

is the case next cited. In that case what the court actually held was that they had no jurisdiction of the case. Whatever there is beyond that is *obiter.* Even in that case, however, it is said that "the contract of a city with a company to furnish gas for the city is not violated by the establishment of another gas company, nor by the city taking stock in the latter company."

Atlantic City Water-works Co. vs. *Atlantic City, 6 Atl., 24,* we believe is the only case which can be cited by complainant which can fairly be said to be in point in their favor. It merely holds a contract by which the city

agreed to pay a monthly stipend for water for a term of years, valid under a charter grant of power to "provide for a supply of water." But we do not believe the reasoning of this decision would lead the court to decide that the city having made one contract could not make another, or that having provided once, its power was exhausted. It seems to us that the very course of reasoning which would lead a court to enforce payment under the terms of a contract for a supply of water, would prevent a court from interfering with the city in any steps it might deem proper to take for obtaining its supply.

It is not necessary for us to maintain that the clause of the contract which required an annual payment of $1,500 is void. But for the two provisions of section II, one of which affirmatively authorizes the city of Walla Walla to erect and maitain water-works, we should have no hesitation in admitting that the city was authorized to contract for a term of years for a supply of water. Probably in every such case the reasonableness of the length of the term would be a question open to inquiry in the courts, since any other view would result in an admission that the city council might bind the city perpetually; but even conceding that the provision in the contract to pay $1,500 annually was within the power of the council and that there was a sufficient consideration therefor, it still leaves open the objection that the city has attempted by this contract to deprive itself of the power of resorting to any other means of obtaining a water supply, and this under a charter which expressly points out two modes of obtaining it.

The City of Louisville vs. *Weidle, I. S. W., 605*, is flatly in conflict with the doctrine announced by this court in the slaughter-house cases, above cited.

It is urged that the city, in making this contract, exer-

cised simply proprietary and not governmental powers. In part we think this is true; in part we feel very sure it is not.

In order to perform almost any of its police or governmental functions, it becomes necessary for a city to contract. The employment of a policeman is a contract; but counsel would hardly contend, we apprehend, that the city could bind itself to employ a policeman for an indefinite time, still more to contract away its power to employ additional policemen. To erect a market-house a city must enter into contracts for the employment of laborers, for the purchase of brick, to acquire a site. All such contracts are essential to the performance of its police duty and will be unhesitatingly sustained by the court. But when, in addition, the city contracts not only to erect a market-house, which is an affirmative action in the discharge of its duties, but also that it will not erect any other market-house, which is a restriction of its police power, the courts will intervene; and this is the precise point on which the decision went in *Gale* vs. *Kalamazoo*, and other cases cited above.

The difficulty with the contract in question is not so much that the city agreed with the company to take water from it for a definite term as it is that they bound themselves not to exercise that discretion as to the sufficiency of the supply or quality of the water and other points, or, if they exercised it at all, to exercise it in a certain manner (?), which is a perpetual discretion, to be exercised, as was said by Justice Cooley, not once for all, but again and again, whenever in the view of the authorities for the time being it was necessary to exercise it. This distinction between an affirmative act in the discharge of its police power and an act by which it seeks to tie its hands from and after the exercise of such

power is fundamental, and a failure to observe it constitutes the essential and ineradicable vice of the contract now in question.

Westerly Water-works Co. v. *Westerly*, (C. C. A.) 80 Fed. Rep., 612.
Smith v. *Westerly*, 19 R. I., 33 (35 Atlantic, 526.)

It may be claimed by counsel for complainant that under this contract they were not bound to supply water for fire purposes. What, then, has become of the important duty of the city to provide for the extinguishment of fires which the charter inposes upon them? Fires can only be put out with water; and the city, if this contract is to stand, has put itself into a situation where its hands are absolutely tied. Is not the duty to provide for extinguishment of fires a part of the police power of the city? There can be no question under the testimony that the pressure in the mains in many places is utterly inadequate to supply even a single stream from the fire engine. But, according to what counsel for complainant may claim, that is no affair of theirs. It is the affair of the city council, however, and if there were no other objection but this, it seems to us this would be sufficient.

But recently this court, in the *Kentucky lottery case*, opinion by Mr. Justice Harlan, explodes the idea that police powers could be bartered away by contract of any kind, and held there could be no impairing of a contract where there was a modification or amendment or repeal even of the grant.

And just here we may say, if the party complaining really wanted a Federal court to pass on the case, it was not cut off in this by going to the state court (where it should have gone), on the impairing of a contract, if the highest court of the State ruled against its contention. In that event, the party had its right of review in this

court. And in the event the ruling of the highest State court should be in its favor, that was all it wanted or could get. *Rev. S., § 709; Baltimore, etc.*, vs. *Hopkins, 130 U. S., 210;* and there are many, very many, other cases to the same effect.

III.

The contract is void as creating an indebtedness in excess of the charter limit:

We insist that upon the making of this contract the city of Walla Walla incurred an indebtedness of $37,500, which, taken together with its then existing liability, was over the limit prescribed by the charter. It will be contended by complainant that the making of a contract to pay for 25 years $1,500 per annum does not create a present indebtedness for the whole amount. If this contract is a valid contract, then the city became immediately liable to the company in the sum of $37,500, to be paid in yearly installments of $1,500. It would not be denied that if a bond were given to become due twenty-five years from date, an indebtedness to the full amount of the bond would be thereby presently created. This contract has the same effect. The payment must be made at some future day, and the contingency demanding payment is sure to take place irrespective of any action taken or option exercised by the city in the future.

Burlington Water Co. vs. *Woodworth, 49 Iowa, 61;*
Coulson vs. *Portland, Deady, R., 481;*
Salem Water Co. vs. *Salem, 5 Ore., 29;*
Fuller vs. *Chicago, 89 Ill., 282;*
Murphy vs. *East Portland, 42 Fed. R., 309;*
Niles vs. *Water-works, 26 N. W., 524;*
State ex rel. vs. *Mayor of Bayonne (N. J.), 26 Atl., 81;*
Davenport vs. *Kleinschmidt (Mont.), 13 Pac., 249.*

IV.

The contract is in violation of the express provisions of a general statute of the Territory of Washington:

The Legislative Assembly of Washington, for the year 1881, passed an act entitled "An act authorizing cities, incorporated towns and villages to provide for a supply of water." We think it completely disposes of this alleged contract. It is found on page 24, session laws of 1881. A reference to it will show that it provides a general and exclusive mode by which all cities, towns, and villages in the Territory shall be authorized to contract for a supply of water. The steps prescribed by that act have confessedly not been followed in the present case.

Session Laws, 1881, page 24.

This act was approved December 1, 1881. The charter of the city of Walla Walla, under which complainant claims the contract in question was authorized, took effect on January 1, 1884. If, then, the act of December 1, 1881, was in force at the time the contract in question was made, it is clear that the contract is invalid, in that it was not authorized by a vote of the people as required by section 2 of said act. It is entirely clear that this general act and the special act incorporating the city of Walla Walla are in no way inconsistent, and that the two acts must stand, and be read and construed together; that the general act of 1881 must be read into the special act of 1884. We admit the force of the rule for which complainant will probably contend; that legislation as to a special subject or locality supersedes prior general legislation, but the rule only obtains where the special act covers everything in the general. For example, if

that portion of the charter which authorized the city to contract for a supply of water, *provided the manner in which it should contract;* if it prescribed the number of years for which it might contract; if it prescribed an election as a precedent and the manner of holding such election; if it prescribed the number of voters whose assent was necessary; if it provided for the creation of a sinking fund to pay the indebtedness then created and the rate of interest which such indebtedness should bear; if, in short, the provision of the special charter covered any one of the many details of the general act of 1881, then it might be contended that as to that point the general act was repealed. But when the legislation merely granted to the city of Walla Walla the power to contract for a supply of water, and were silent as to the manner in which it should exercise that power, they showed conclusively their design that the city of Walla Walla should, with other cities, follow the general statute, which it did not do. We content ourselves with a citation of the authorities most in point upon this question.

Endlich Interp. St., Sec. 56.
Dil. Munic. Corp. (3d Ed.), Sec. 87.
Sutherland Sta. Const., Sec. 145.
State vs. *Witter, 13 S. E. (N. C.), 328.*
Talcott vs. *Harbor Commissioners, 53 Cal., 199.*
Baldwin vs. *Green, 10 Mo., 410.*

That the Legislative Assembly of the Territory of Washington had ample power to pass this act can not, we think, be questioned. It was in no way special legislation, but applied generally to all cities, towns, and villages in the Territory. The power conferred upon the Legislative Assembly by the organic act is full and complete.

Section 851, R. S.,

Which provides—

> "The legislative power of every Territory shall extend to *all rightful subjects of legislation* not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposition of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

We apprehend that the only serious contention that can be made by complainant is, that by virtue of the provisions of the act it has never gone into effect. Section 8 is as follows:

> "This act, when approved by the Governor of this Territory, shall be in force upon its approval or ratification by the Congress of the United States."

It may be contended that as Congress never, by any specific action, ratified or approved this legislation, that it has never gone into effect. We insist that this statute can have no construction, except the ordinary construction given to clauses of this kind, namely, this act should be approved by Congress in the same manner as all other acts were required to be approved. It can not be claimed that it was the intention of the legislature that the manner of approval of this act should be different from the approval of other acts. In effect, all acts of the Territory of Washington required the approbation of Congress. The organic act lays down the manner of approval.

Section 1850, R. S.,

Which reads as follows:

> "All laws passed by the Legislative Assembly and Governor of any Territory except the Territories of Colorado, Dakota, Idaho, Montana, and Wyoming shall be submitted to Congress, and if disapproved shall be null and of no effect."

We believe the final clause requiring the ratification of Congress is mere surplusage, a mere affirmative assent to the organic act which provided for Congressional supervision of territorial legislation. The framers of the bill did not enact that it should have force only after its "approval," but after its "*ratification or approval*," knowing well that no act was valid without the ratification of Congress, but also knowing that Congress nearly always accorded that ratification by neglecting to disapprove. A delicate compliment to the supremacy of Congress, but written with knowledge of the law, as stated in the case of *The Miners' Bank* vs. *Iowa*, 12 How., I—

> "Congress, in creating the territorial governments and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity ordain a suspension of all acts proceeding from these powers until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disowned them of their very power of self preservation."

Nor is there force in the point which may be made by counsel that this act was mere tentative legislation,

drawn by the legislators who deemed its provisions for the benefit of the people of the Territory and then humbly and fearfully submitted it to Congress. The people of the Territories were never in law, and certainly never in their own contemplation, in such a state of servitude. They were aware of all their rights; they knew the act would be submitted to Congress, and if not acceptable would be affirmatively disapproved, otherwise the ratification they expected would be tacitly given, and we contend it was thus given.

This law, of course, took the same course as all other laws passed by the Legislative Assembly of the Territory; was submitted to Congress, and by failing to disapprove, Congress thereby approved. It seems to have been the clear intention of the organic act that Territorial statutes should be submitted to Congress for examination. If Congress approved of the legislation, no action was necessary; if it disapproved, it was necessary to express that disapproval. Submission of the act, therefore, to Congress, and no action thereon by Congress, amounts to approval.

We are able, by careful research, to find two cases, one from Oregon and one from Indiana, distinctly upholding the construction for which we contend.

Biggs vs. *McBride, 21 Pac. Rep., 878*;
Tarleton vs. *Peggs, 18 Indiana, 24*;
And see *Miners' Bank of Dubuque* vs. *Iowa, 12 How., 1.*

In the first of the above-named cases a statute was passed by the Legislature which, by its terms, provided that the same should take effect and be in force from and after its approval by the Governor. The Governor never did approve the act, but, on the contrary, expressly disapproved it by veto. The act was passed over the

Governor's veto by the requisite constitutional majority. It was contended against this act that the contingency upon which it was going into effect had never happened, and therefore that the act had never taken effect and was not the law. This contention, however, was not sustained by the court. The court says, at page 879:

"If the words 'from and after its approval by the Governor' are to be treated as a condition precedent, as the contention assumes, then it could never take effect, for the reason the condition has never happened. But this method of treating a grave constitutional question seems scarcely satisfactory. It seems more like a quibble over words than an attempt to ascertain what the Legislature really meant by the use of the phraseology in question. I think there can be no doubt that the Legislature used the language in question in the same sense they used the words 'from and after its passage.'" And the court in this case holds that from and after its approval by the Governor meant simply that the act should take effect and be in force when the requisite conditions provided by the Constitution had been complied with. Can it not be said with equal force that the Legislative Assembly of the Territory of Washington meant simply by the language used that the act should go into effect when the provisions of the organic act had been complied with, namely, that the same had passed both houses of the Legislature, been approved by the Governor, submitted to Congress, and not repudiated by that body?

The last case above named, while not so clearly applicable sustains the contention we make.

The section of the statute under consideration can also be given by interpretation consistent with the language used, namely, that the Legislature intended to provide

that the act should go into effect upon two contingencies; first, approval by the Governor; second, ratification by the Congress of the United States; the intention of the Legislature being that "this act, when approved by the Governor of this Territory, shall be in force upon its approval," or "this act shall be in force upon its ratification by the Congress of the United States."

We submit that the act should be sustained as an expression of the legislative will, unless it clearly appears that it was the intention of the Legislature to make its going into effect contingent upon affirmative action of Congress; and we submit that such intention does not appear by the language of the act itself, or by any considerations the courts have ever given to such provisions.

Upon the Facts,

We submit that the evidence shows that the complainant has in every wise failed to provide the city of Walla Walla water within the meaning and contemplation of the alleged contract, and for such reason should be held not entitled to relief nor aid in equity, it confessedly being a wrongdoer, and showing itself entitled to no equity against those who have suffered by the voluntary neglect of said complainant to comply with the alleged contract. We present the indexed testimony as follows, and its abstract for the information of the court, and to sustain appellants in this issue:

An examination of the testimony in this case shows the following:

1. That there is a part of the thickly-settled and central portion of the city of Walla Walla over which Walla Walla Water Company has extended its mains, and supplies the city and its inhabitants with water;

2. That there is a large area, constantly growing in size and increasing in population, over which the mains

and pipes of the said company have not been extended and into which it has not entered, and which, from the elevation of the land, being as high, or higher, than the sources of supply, the said Water Company can not enter or supply with a gravity system.

The testimony adduced by the appellants shows that, as to the territory embraced in proposition No. 1, above, the supply in ordinary years is inadequate and unsatisfactory alike to the city for fire protection and to the inhabitants for consumption and the irrigation of lawns.

Every fireman of the city department who testified on the part of appellants complained that the supply was insufficient to furnish water enough for two engines running two streams each. See the testimony of—

	Record.
Albert E. Guichard	150, 151
Edwin G. Fanning	157
J. J. Kauffman	161
Jefferson Faucette	163, 164
William Conlan	170, 171
Henry Retzer	175
William Preston	179
Robert J. Wolff	183, 184
James Corliss	188
Robert Johnson	192
Robert Mathews	197
Henry Debus	200, 201
Arthur M. St. Clair	204
Nicholas Lux	206
Ralph E. Guichard	208
Joseph Graaff	277
Charles DeMoss	293
Peter Kauffman	294
Ralph White	297, 298

The pressure on the fire hydrants is inadequate for fire protection. See testimony of—

	Record.
Edwin G. Fanning	157, 158
Jacob Betz	214, 215, 216, 218
John L. Roberts	280, 281
George H. Sutherland	287

The pressure of the water in the mains is insufficient to give a satisfactory water supply in the second stories of business houses and residences.

	Record.
Oliver P. Barker	231
Thomas Quinn	236
A. J. York	237
John Dooly	250
Clark H. Barnett	252
Fred Talabera	262
W. A. Kelly	273
Samuel Cottrell	275
H. D. Henroid	300
Marshall Martin	303

Within the area occupied by the mains and pipes of complainants the supply to consumers is inadequate for the irrigation of lawns.

	Record.
Thomas Moore	166
George C. Johnston	168
Mezer B. Dwelley	229
Dion Keefe	233
M. McCarty	239
Andrew J. Evans	244
Andrew J. Newton	244, 245
Patrick Walsh	253, 254

The complainant, having an inadequate supply of water, has made rules limiting its use to certain hours of the day; but to prevent complaints being made, it permits infractions of its rules. See testimony of—

Under the terms of the contract, the said Walla Walla Water Company, the complainant, "shall extend their system of mains as fast as the population and growth of the town shall reasonably warrant." The testimony shows that the rule for extension of mains followed by the company is to extend, if private parties, who wish to become consumers, will put in and pay for the extension. See testimony of—

Portions of the city of Walla Walla are too high to be supplied by complainant by their gravity system.

Henry P. Isaacs, Rec., 127, 130, as to Isaacs' addition.
Thomas Moore, Rec., 166, 167, and
George C. Johnston, Rec., 168, 169, as to Cain's addition.
Philip Yenney, Rec., 224, 225, and
George H. Snell, Rec., 248, 249, and
James Z. Smith, Rec., 259, as to Reed's addition.

Many of the mains and pipes of the said complainant are not large enough to carry sufficient water for an adequate supply to consumers along them. See testimony of—

F. M. Bowman, on cross-examination, Rec., 53 to 63.
J. F. Bowman, Rec., 130 to 140.
John L. Roberts, Rec., 141, 142.

At the time the ordinance, No. 270, of the city of Walla Walla was passed, the vote stood four in favor and three against its passage. Friends of the complainant urged upon the council that the hydrant pressure would be so great that the city could do without fire engines. See testimony of councilman—

John Manion, Rec., p. 270.

The testimony of Henry Kelling, the city clerk, and a witness for complainant, Rec., 32, shows that those who opposed the passage of the ordinance did so on the ground that the water company had not sufficient water to supply the demands of the contract.

For those additions and parts of additions, which were not at the time of the granting of the franchise, and are not now supplied with water, see the testimony of witness, Henry Kelling, Rec., 32, 33.

The season of 1893–1894 was a particularly wet season;

the rainfall and snowfall were excessive. See testimony of—

Fitzhugh Newman, Rec., 267.

It will be seen from this examination of the evidence, that a large portion of the mains of the complainant does not exceed two inches in diameter; that the pressure and supply in its mains are not sufficient for fire protection to the city and for domestic supply and irrigation of lawns to the consumers; that the pressure is not sufficient for satisfactory use in the second stories of buildings; that a number of the additions of the city are higher than the company's reservoirs and can not be supplied from them; that a large number of additions lower than the reservoirs have not yet been supplied, and that the company extends its mains into said additions only when private citizens will put in and pay for the small pipes that will supply them with water; that the company is well aware of this inadequacy of supply, and the existing dissatisfaction, and endeavors to silence complaints by permitting its rules to be violated or suspending their enforcement.

For all the reasons herein urged, we respectfully insist, that upon both the law and the facts, this cause be reversed and order made directing a dismissal of the bill of complaint.

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Attorneys for Appellants.